

Legal Nature and Functions of Referendum in Constitutional Law Theory

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ABSTRACT

The relevance of the study of the legal nature and functions of the referendum is conditioned by the increasing dynamics of development of direct democracy in the developed countries and the needs to legalize it in constitutional and legal norms to ensure stability in society. The purpose of this paper is to define the legal nature of the referendum in the context of the theory of constitutional law. The research methodology is built on the comparison of institutional and instrumental features of the referendum. The materials of the legal practice of the Federal countries of Western Europe are investigated, having a tradition of direct democracy and the practice of its legislative regulation. The basis of the study is constitutional norms about the referendum of the Constitution of Germany, Switzerland, Austria and Belgium, as well as quantitative data on referenda in those countries. In the result of the study of the legal nature of the referendum the evident instrumental purposes of direct democracy are justified: legitimation, restraint, institution, self-government and political arbitration. Also a conclusion is made about the instrumental function of the referendum in modern Federal countries of Western Europe. The obtained results of the study are important in theoretical terms - for the development of the definition of a referendum, understanding of its legal nature and functions, and in practical terms - for legislative activities and public discussions about ways of development of democracy in certain public conditions.

KEYWORDS

European Federations, constitutional law, institutions of democracy, instruments of democracy, referendum

ARTICLE HISTORY

Received 9 April 2016
Revised 20 May 2016
Accepted 17 June 2016

Introduction

In the theory of constitutional law the framework concept has been formed that puts direct democracy into the system of legal and institutional coordinates of the modern state-legal model. The role that in this system is played by a

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direct democracy is “to ensure by institutions of direct democracy of accountability and responsibility of representative bodies for their constituents, about limitations by the institutions of direct democracy of the tyranny of representative government and of their interrelationships” (Kovachev, 2005).

Thus various forms of direct democracy are treated as “a set of legal mechanisms in force in the state context, which is a deterrent for public authorities. These mechanisms are largely political in nature, and include concepts such as the people's consent based on free and fair elections, referenda and the procedure of the popular initiative” (Momirov & Fourie, 2009). Described in the presented quotation the mechanisms are activated in cases when there are disruptions in regular institutional system, namely: “in case of discrepancy between the actual will of the representative body and the people in addressing a specific issue the mechanism of direct democracy must start in the action, within the which the true will of the people would be revealed regarding the resolution of this issue. Such a mechanism could be put in the form of a referendum, appointed by the President or other authority at the request of the citizens (population)” (Gyatov, 2007).

Thus, it is clear that there is a dominant point of view according to which direct democracy is the specific mechanism, - the institution within a democratic regime, balancing a Republican form of government (Shmelev, 2005; the Referendum, 2007; Krylov, 2009; Maltsev, 2009; Trykhanova, 2011). This condition could be ideal however there are a number of obstacles.

Methodological framework

To give reasons to determine the legal nature of the referendum and other legal forms of direct democracy, one can address to the materials of the legal practice of the Federal countries of Western Europe, which have a tradition of direct democracy and the practice of its legislative regulation. Comparative analysis for the purposes of the present study was carried out, in particular, of constitutional norms on the referendum of the Constitution of Germany, Switzerland, Austria and Belgium, as well as quantitative data on referenda in those countries.

Results and Discussion

As shows the analysis of legal practices in Western European countries, forms of direct democracy are weakly institutionalized, it has no regularity, and in addition most clear legal form of expression of people's will is a referendum initiated by the people themselves is relatively rare even in Switzerland (on seven referendum initiated by Parliament, there is only one referendum initiated by the people). While in the above-cited interpretation of R. Gyatov (2007) one can read that this institutionalized mechanism of direct democracy is included by one national authority for the correction of activities of other Republican authority. This approach to the interpretation of the function and a description of the implementation of direct democracy should be called institutional, as it comes from the fact that forms of direct democracy in a modern state-legal system are institutionalized and these functions can even be classified so they appear in relief as in law so in legal practice.

In our opinion, only on the basis of such a excited understanding of direct democracy as an established Institute, one can build a complex conceptual



model, which assumes functions of the Institute, as it was done by V.V. Komarova (2006), highlighting mandatory, advisory and regulatory functions of direct democracy:

- mandatory – a final decision on certain issues;
- advisory – identifying, the mapping of the will of the people and formed by them a body of power
- regulatory - participation of the people in the system of social management based on the concepts of representative government and people's sovereignty (Komarova, 2006).

Meanwhile, a study of the legal regulation of forms of direct democracy and the right practice of their legal implementation, unfortunately, does not allow to conclude that in developed Western European countries, forms of direct democracy has not reached its institutionalization. There is an extraordinary example of Switzerland, where a referendum has become a common practice of the Swiss, four times a year delivering their decision on the all people's vote for a wide range of issues. This exceptional detail of the politico-legal system for the lives of eight million people, though that is for many researchers an model example of democracy, but is not even close to the common rule for half a billion people in other European countries. The resulting comparative studies tip the scales to the definition of the function of direct democracy in modern political and legal realities, only as a tool.

The difference between the Institute and the tool within the one and the same system of interrelated concepts is that the Institute is an independent full-fledged object, but a tool – only a means of influence on the object.

There are several obvious tools for the appointments of direct democracy, but the list is not closed: the legitimation, restraint, institution, self-government and political arbitration.

Switzerland undeniably has the richest tradition of referendums. Only in Switzerland people's initiatives actually can obtain the status of laws at open voting. But there are tools of direct democracy, which are Addendum to the parliamentary activities. Without a parliamentary framework and support even the Swiss referendum - democracy can't work.

In most countries, legislative initiatives come from the government and accepted by Parliament. In some countries there are mandatory and optional referendums; in some countries plebiscites are possible, whose decisions are not binding on the public authorities, as in Switzerland, in Denmark and in Italy (Buchakova & Shevchenko, 2016). From the results of research of European scientists it is visible that as an instrument of amendment of the Constitution, direct democracy is neither regular nor clearly and institutionalized phenomenon (Hoxhaj & Bjanku, 2013).

Statistics clearly indicates that the Constitution in Federal countries often is changed in the Republican way. So the Basic law of the Federal Republic of Germany since 1949 has been amended more than 50 times, In Austria since 1945 more than 800 amendments has been made to the Constitution of the 1920. These changes were adopted in the form of a constitutional law or in the form of Supplement of laws by special constitutional provisions (Garlicki & Garlicka, 2012). As a tool for foundations' change of the Constitution the referendum has been entrenched in law but not yet in 100% of the Federal

constitutions of the countries of Europe (particularly in Belgium it is not fixed). Thus, it is possible to say that form of direct democracy, a referendum is most often used as a tool of legitimation of the decisions of Republican institutions of government. And therefore acts as an additional constitutive tool, as the instrument of a higher legitimization (Loughlin, 2003).

. Regulation on the use of the tool of the referendum most often is developed legislatively, but the objective conditions of its application are not clearly standardized and so the implementation of the norms of direct democracy often is subordinated to political trends (Cronin, 1989).

The referendum is also used as a tool of deterrence. In the constitutions of Western European countries (Germany, Switzerland) the referendum procedure is established as a mandatory tool of legitimation of the territorial changes, which can be in demand due to the evolutionary processes of the state. However, from the norms of the constitutions of these countries it does not follow that a referendum is convenient and therefore dangerous means of reformatting of the state, which should entail the issuance of such governing referendum laws, which would complicate its initialization. First, the legislative regulation of forms of direct democracy indeed lays the tools of their management, such as in Austria where “unacceptable to the government initiatives are easily rejected by the government majority in Parliament and may even not be considered by the latter” (Iljinskyi, 1985). Secondly, it is important to understand that the referendum is a tool that can effectively perform a conservative function. Namely, in the face of threats to the territorial integrity of the state referendum can play the role of the stopping power, - an extreme instance, which imposes a veto on attempts to split the state. Thus, the voting majority in a referendum on territorial integrity can be a reliable guarantee of territorial separatism, giving into the hands of the Executive branch *carte Blanche* for actions to preserve the territorial integrity of the country.

For this conclusion there is a sufficient basis - statistics of results of referendums in Switzerland. “Beginning from 1848, when the Swiss Constitution legalized the institution of referendum and people’s initiative at the Federal level, Canton and commune, till 1971, in 157 cases of referendum, 63% were initiated by the Parliament and 13% by the electorate” (Mamichev, 2000). General characteristics of the referendum of Switzerland are reduced to ascertaining of conservatism of this institution in a given period of time. “The referendum is conservative by nature. The majority of Swiss referendum ends with support of the status quo and the rejection of the proposed reforms” (Mamichev, 2000). To date, there are no known cases when a revolutionary decision would be taken by the referendum, especially in Federative States in Western Europe.

Successfully the referendum is used and as a founding instrument, including in Europe (Derevyanko, 2008). Currently, the referendum is an important element in the process of creation of State in international law. It can be argued that democratic norms as a legitimate source of creation of the state has become dominant in the world. In international and national legal systems, they are considered as maxims.

This has led, firstly, to the fact that the referendum occupied a dominant position in the international legal rhetoric; secondly, it expanded its presence in the international and national legal documents; and, thirdly, that a referendum



has become a legal instrument that tackles the controversial issues of the international status of the territory (Gökhan, 2015).

One can affirmatively say that the statistical analysis of the bicentennial of the practice of referendums shows the consolidation by referendum of its position as a mandatory tool for the creation of the state in politics and law (Tierney, 2009). Regular and ongoing political practice not only led to a General recognition of the founding of the referendum, but also to its requirement on the level of different international and national entities to legitimize the territorial changes.

As an instrument of self-government direct democracy clearly shows itself more at the municipal level. Most rich is the experience of the Swiss national self-government in a referendum. Thus, in accordance with articles 138 and 139 of the Swiss Constitution, the people's initiative is admissible only on issues of a full or partial revision of the Constitution. To encourage the national Council or the Council of Canton to adopt or change a law, citizens have to make proposals for the partial revision of the Constitution, and they are willing to do so (Matveyev, 1995).

The positive experience of Switzerland testifies the availability to carry out the right of people's legislative initiative in the form of legislative proposals containing General guidance to citizens about the necessity of changing the Constitution or the adoption of a particular law, either in the form of completely ready bill (Rudenko, 2001; Fomina, 2005). Examples of national self-government using the tool of a referendum are not only in Switzerland but also in Belgium and in Austria. As it is shown by V.N. Rudenko (2001), "people's initiative in modern society serves as one of the tools of overcoming of political alienation of citizens from the government". And in this one could agree with the author, emphasizing that it is a tool, but not the Institute.

The use of the referendum as a tool to engage and encourage citizens to participate in the decision-making process at the state level can be interpreted in two ways: as with the aim to implement national self-government and with the objectives of political entities of other nature - political arbitration, namely: "... an expression of support for or mistrust to state authorities and their policies" (Sintsov, 2008).

Political arbitrage of higher – level is appeal to the people as the bearer of Supreme power in the state is demanded in cases when there is an acute of conflict between the balanced in political system Republican authorities. For example, between an elected President and elected Parliament. In this case, the use of the tool of referendum to the resolution of important domestic problems is often served by political opponents as threats to each other.

As it was shown above, in the legal academic literature the view was established that direct democracy regulated by law, could be an acceptable tool of political pressure of one of the Republican authority on the other. And only the possibility of the application of this constitutional tool already balances the political and legal system. Here, the referendum stands as one of the most important tools of constitutional order, confirming the thesis of G.K. Artamonova, V.V. Gorbachev & A.A. Klishas (2012) that "the Constitution is essentially an inherent property of any democratic state to preserve political stability and further positive development".

As wrote F. Curti (1990), "... representative institutions wherever they may operate arbitrarily, too likely to turn into a special class, in a caste, which instead of the public interest observes only their own. The people's vote of a referendum reminds the parliamentarians about their responsibilities; they force them to seek a rapprochement with the people". Thus, direct democracy as the constitutionally regulated referendum in this theatre acts as a strategic resource in the Arsenal of the legal means of political pressure in the system of checks and balances of a modern Republican form of government.

Conclusion and Recommendations

Considered five ways of the tools using of direct democracy allows to judge about it as a backup means of influence on certain elements of the political and legal systems of the countries of Europe in the democratic process, but not as a full-fledged Institute. Direct democracy even in developed Federative countries of Western Europe does not have the full legal institutionalization. The referendum somehow has its legal regulation in the Constitution and constitutional laws, but more often acts as a public tool to obtain a legitimate basis of power, and not a current Institute of direct expression of people's will. Including the fact that because the legislative regulation of the people's initiative is not available in all European federations.

Thus, this study develops the applied in science determination of the referendum, and clarifies the view of its legal nature and functions, which represents a progress of knowledge in the field of constitutional law theory. In addition it is addressed and for the purposes of the legislative process, from which society expects an adequate reflection in the law of the evolving practice of direct democracy.

Disclosure statement

No potential conflict of interest was reported by the authors.

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